

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-4033

Appeal PA18-327

Ministry of Natural Resources and Forestry

March 2, 2020

Summary: The ministry received an access request for records about staff costs relating to the annual Indigenous deer harvest carried out in a provincial park between 2013 and 2018. The ministry provided access to records in response to the request. The appellant believes that there should be additional responsive records for the 2017 deer harvest. In this order, the adjudicator upholds the ministry's search as reasonable and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, section 24.

Orders and Investigation Reports Considered: Order PO-1920.

OVERVIEW:

[1] The appellant made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Natural Resources and Forestry (the ministry) for records relating to the costs, including staff salaries, overtime costs and related expenses, associated with the annual Indigenous traditional deer harvests carried out by the Haudenosaunee Confederacy in Short Hills Provincial Park between 2013 and 2018 (the Short Hills deer harvest).

[2] The ministry located responsive records and granted the appellant partial access to them. The ministry claimed the mandatory personal privacy exemption in section 21 of the *Act* to withhold portions of the records.

[3] The appellant appealed the ministry's decision. In her appeal letter, the appellant raised the issue of reasonable search. Specifically, the appellant claimed that information relating to staff salaries paid during the 2017 harvest ought to exist.

[4] During mediation, the appellant confirmed she does not pursue access to information withheld under section 21 of the *Act*. Therefore, section 21 is not at issue in this appeal.

[5] However, the appellant confirmed her interest in obtaining access to the staff salaries for the 2017 deer harvest. The ministry provided the appellant with information regarding the search it conducted. The appellant was not satisfied with the ministry's explanation and claimed that additional responsive records exist.

[6] Mediation was unable to resolve the appeal and the matter was transferred to the adjudication stage where the parties were provided with an opportunity to make representations. The ministry's representations included affidavit evidence about the search for records.

[7] In this order, I find that the ministry conducted a reasonable search and I dismiss the appeal.

DISCUSSION:

[8] The sole issue in this appeal is whether the ministry conducted a reasonable search. The reason why the appellant believes that the ministry failed to conduct a reasonable search is because the access request did not yield records with information about the staff costs for the 2017 deer harvest. The appellant's skepticism arises for two reasons. First, she was provided records about staff costs for years 2013 to 2016. Second, a ministry employee (separately from the request leading to this appeal) provided her with information about the staff overtime (and other) costs for the 2017 deer harvest in response to her email request for information.

[9] When a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution – the ministry in this appeal – has conducted a reasonable search for records as required by section 24.¹ The *Act* does not require the ministry to prove with absolute certainty that further records do not exist. However, the ministry must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.²

[10] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which

¹ Orders P-85, P-221 and PO-1954-I.

² Orders P-624 and PO-2559.

are reasonably related to the request.³

[11] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.⁴

Representations

[12] The ministry submits that it conducted a reasonable search. In two affidavits, it outlines the steps that were taken by a senior employee to conduct the search. Five employees with familiarity with the Short Hills deer harvest were involved with the search. Twenty-four pages of responsive records were provided to the appellant.

[13] The ministry explains that for 2013 to 2016, the ministry had additional staffing needs for the Short Hills deer harvests and that those additional costs were tracked. The ministry says that in 2017 a decision was made not to “attempt to track the breakdown of salaries for permanent and existing contract employees who worked during the harvest.” The ministry’s representations provide the rationale for this decision, but I have not repeated them here as this is not relevant to my assessment of whether the ministry conducted a reasonable search in compliance with the *Act*.

[14] For all of these reasons, the ministry explains that records about staff costs for the 2017 deer harvest do not exist. The ministry stands by the reasonableness of its search and says further that it did “not have an obligation to create new records for the purpose of this appeal.” Referring to Order 17, the ministry says that the *Act* does not require an institution to create a record in response to an access request if one does not exist.⁵

[15] In response, the appellant explains that the ministry located and produced to her records about staff costs for the annual Short Hills deer harvest for 2013 to 2016. In addition, the appellant explains that in January 2018, she emailed the manager responsible for staffing the Short Hills deer harvest to request the total cost. In response, a ministry employee provided the appellant with information, including about the overtime costs. The appellant states, “I do not understand how one could calculate overtime salaries if you did not calculate and track regular staff salaries to begin with.”

[16] In reply to the appellant’s arguments about the email, the ministry states that the appellant’s conclusion is speculative. Referring to Order PO-1920, the ministry submits that the issue before me is not to determine whether records exist but rather whether the searches carried out by the ministry were reasonable and it says that the evidence provided in this appeal amply establishes that it did.

³ Orders M-909, PO-2469 and PO-2592.

⁴ Order MO-2246.

⁵ Order 17 at p. 8, citing the Williams Commission report and *Saiyeh v. Ontario (Information and Privacy Commissioner)*, 2014 ONSC 741 at para 16, upholding Order PO-3172.

[17] The ministry says that the appellant is “essentially arguing that the [m]inistry failed to create records responsive to those parts of the request relating to staff salary breakdowns in 2017.” It disputes that the ministry had such an obligation and that if such records existed, they would have been located during the searches. The ministry provides additional information about the information contained in the email that gives rise to the appellant’s skepticism, pointing to how the information could have been calculated without creating new records. The ministry’s main submission remains the same – that the records requested do not exist.

Findings and Analysis

[18] I do not agree with the ministry that the appellant seeks to cause the ministry to create a record where one does not exist. The appellant raised questions about the sufficiency of the search and has, through this appeal process, caused scrutiny to come to bear on the ministry’s response.

[19] Having brought that scrutiny to bear, I am satisfied that the ministry has conducted a reasonable search. I form this view in consideration of the following factors:

- a senior ministry employee coordinated the search, which was completed with the assistance of employees who had sufficient and suitable background knowledge,
- the ministry’s representations demonstrate that it understood the appellant’s request and provided responsive records,
- the ministry gave a credible explanation for how a ministry employee was able to provide the appellant with information about the overtime costs when there are no responsive records for 2017,
- the locations searched yielded responsive records for prior years meaning that if the records existed for 2017, the search would have yielded these, and,
- the ministry gave a credible explanation for why records available for prior years are not available for the 2017 deer harvest.

[20] To conclude, through its detailed submissions and evidence, all of which have been provided to the appellant, I find that the ministry has demonstrated that it conducted a reasonable search as required by the *Act*.

ORDER:

I uphold the ministry’s search for records and dismiss this appeal.

Original Signed By: _____
Valerie Jepson
Adjudicator

March 2, 2020 _____